

CAMDEN ZONING BOARD OF APPEALS
MINUTES of MEETINGS
March 15, 2010

PRESENT and VOTING: Chair: Frank Toole: Members: Leonard Lookner, and George Wheelwright; Alternate Member: Linda Norton

ABSENT: Members: Tom Laurent and Sam Smith

ALSO PRESENT: CEO Jeff Nims, Town Attorney Bill Kelly and Applicants' Attorney Paul Gibbons

The Meeting was called to Order at 5:05 pm in the Washington Street Conference Room. There are four voting members present and a 3-1 vote is required for approval. The Applicants' representative chose to go forward and not wait for a time when there is a full Board present.

DECLARATION OF CONFLICT

Members were asked to declare any possible conflicts of interest they might have regarding the case before them; none did.

CHANGE IN A NONCONFORMING LOT

Request to create two non-conforming lots in the Shoreland District

Joseph and Deborah McClusker: Map 114 Lot 212: V & S (Traditional Village and Shoreland) Districts: 10 Ames Terrace: Megunticook River

The Applicants' Attorney was familiar with the Board's review process so the Chair turned directly to the CEO for a summary of the request before the Board. Prior to the adoption of the Camden Zoning Ordinance the Applicants owned a lot with two residential dwellings – a house and a house trailer, as well as a garage with an apartment over. In 1986, a permit was issued for a trailer. There was already the house and the garage unit, and this third unit was allowed under the 1985 Ordinance for lots in the (then) Residential II District. Prior to the 1989 adoption of the Shoreland Zoning Ordinance, the minimum lot size in this District was 10,000 SF (on sewer) and the lot, at about 37,500 SF, was conforming with the three dwelling units. At that point in time the Applicants could have created three separate legal lots, but Shoreland Zoning increased the minimum lot size to 40,000 SF and the situation became non-conforming. On October 8, 1996, a permit was issued to replace that grandfathered trailer with a double-wide. That unit was owned by a family member now deceased, and in order for the estate to be settled the unit must be sold. The Applicants are seeking approval of their request to split the non-conforming lot into two non-conforming lots so they can sell the modular unit.

Mr. Nims referred the Board to Article VII of the Ordinance (Zoning Board of Appeals) Section 3. Powers and Duties (3) Changes in Nonconforming Uses; or Lots, Structures and Uses in the Shoreland Areas: This section gives the Board the power to address non-conformities as described in Section VI Nonconformances, Section 3 Nonconforming Uses. However that Section been amended at the direction of the DEP several times over the years and all references to lots have been dropped - the section now applies to uses on lots only. So, the Board has the Power to address a non-conforming situation that no longer exists within the Ordinance. Although this "disconnect" needs to be addressed, it remains that there is currently no mechanism to make a change to a non-conforming lot within this referenced section.

Mr. Nims then turned to Article VI Section 2. Nonconforming Lots (2) Lots with Structures which was recently amended by the voters and which now contains the following provision:

“(b) If two or more principal uses or structures existed on a single lot of record on the effective date of this ordinance, each may be sold on a separate lot provided that the above referenced law and rules are complied with. When such lots are divided each lot thus created must be as conforming as possible to the dimensional requirements of this Ordinance.”

The amended Ordinance was adopted by the town on December 15, 2009, and members of the Board received their copies this evening – their first meeting of the year. The Applicant’s Attorney noted the he had been prepared to make other arguments, but upon discovering this amendment, he is confident that his client’s request falls squarely within this provision.

Although the provision does not reference the ZBA in any way, Mr. Nims believes that the language “as conforming as possible” requires a decision by someone other than the CEO who is not given the authority to make such judgment calls. He is asking the Board to make a decision on whether or not this application falls under their purview or his. If they determine that it is his decision to make they should formally refer the matter back to him.

The Applicant’s Attorney presented his client’s request: The owner’s mother-in-law, who purchased the double-wide for use as her residence, passed away recently. Although the unit has been rented, the estate wants the full value of the house now and the property owners don’t have that money. If they cannot split the lot they will have to sell the entire property including their house. This was a legal lot before the Ordinance change and the Applicants argue that splitting the lot into two parcels will be a change on paper only – there will be no change in appearance from the street and will have no impact on the neighborhood now or in the future since neither of the lots can be further developed. The division will not give the future owners of either lot any more rights to expand than the current owner has at this time. Mr. Gibbons asks that his clients be able to keep the right they had before Shoreland Zoning took effect to divide this lot.

The Applicants submitted a packet titled *Jay McClusker* and dated March 15, 2010. In it they presented two scenarios for division prepared by Landmark Associates - both versions dated March 10, 2010 and both labeling the proposed lots Parcel A and Parcel B. The most important difference between the two proposals is the way it treats the river frontage. The first version (Exhibit A) splits the river frontage equally between the two parcels and results in two lots of approximately the same size: Parcel A = 18,800 SF and Parcel B = 18,000 SF. The second version (Exhibit B) leaves all of the approximately 50’ of frontage with the McClusker’s house lot (Parcel B) and results in two lots of different sizes: Parcel A = 13,000 SF and Parcel B = 23,000 SF (approximate areas). Both versions use the same Ames Terrace frontage: Parcel A = 75’ (the minimum required) and Parcel B = 132’.

QUESTIONS from the Board:

Mr. Lookner: Asked the status of the doublewide trailer. The CEO responded that this unit was upgraded in 2005, put on a slab and is now classified as manufactured housing. It remains a grandfathered dwelling unit. He asked if the lot meets the set back and lot coverage requirements – Mr. Gibbons did not know. Mr. Nims replied that all of the structures were well outside the 75’ setback requirement so that does not apply here. However, the units are in the Shoreland Zone so other provisions do apply.

Mr. Nims spoke to resulting non-conformities: In both cases both lots have adequate road frontage so that nonconformity is not increased; Exhibit A results in two equally sized lots which

makes them equally non-conforming while Exhibit B results in Parcel A being more non-conforming than Parcel B; because the frontage on the river (50') remains the same as it is now, the one lot with the frontage requirement does not become more non-conforming - it does with Exhibit A in which the frontage for each lot is 25'; the only issue where non-conformity may be increased in accepting either version is lot coverage – he does not have the figures available, but since lot coverage will now be based on smaller lot sizes, the lots could become non-conforming in this regard, or the change could limit the ability to expand the dwellings in the future.

Mr. Toole prefers Exhibit “B” because there are fewer new non-conformities resulting.

Mr. Kelly noted that as a matter of law, it is difficult to allow non-conforming shore frontage to be divided – Exhibit B would prevent that situation from occurring. He did note that Exhibit B results in Parcel A being smaller than Parcel A. If the result is that Parcel A becomes non-conforming with regard to lot coverage, the proposed division line may have to be adjusted to prevent that or to at least reduce that non-conformity to the greatest extent possible. That line adjustment could be made a condition of approval.

MOTION by Mr. Lookner seconded by Mr. Wheelwright to close the Public Hearing.
VOTE: 4-0-0

The first question before the Board was whether this was a ZBA issue or whether the application should be returned to the CEO for a decision. The Chair polled the Board:

Mr. Toole: The subjective language of the ordinance “as conforming as possible” convinces him that this is within the ZBA’s purview.

The rest of the Board agreed.

MOTION by Mr. Lookner seconded by Ms. Norton that the application brought before the Zoning Board of Appeals tonight is one that the ZBA should move on.

VOTE: 4-0-0

Mr. Wheelwright: The lot is clearly within the Shoreland, and the Board should give greater weight to considering non-conformities that will be created by either division as related to that Ordinance than they do to other non-conformities that will result. He asks if the Board should give weight to the economic impact that would result in denying this application as they make their decision.

Mr. Toole: Finds the following:

- The current situation – a non-conforming lot three dwellings within the Shoreland Zone - is more non-conforming than the result of a division: a non-conforming lot with one dwelling and a non-conforming lot with two dwelling units.
- The lot with three dwellings was conforming at the time the third dwelling was added.
- Replacing and then upgrading the third dwelling unit did not make the situation more non-conforming because that non-conformity existed prior to the Ordinance.
- The Applicant’s proposal will result in two non-conforming lots.

Mr. Gibbons added that the fact that the dwelling units are there legally actually creates a division of the lot into dwelling areas – the proposal just formalizes that division.

Mr. Wheelwright asked Mr. Kelly about the impact on their decision of the Maine Supreme Court Case submitted in support of the Applicant’s request. Mr. Kelly replied that this case,

John W. Wickendon et al v. Genia Luboshutz et al did not need to be referenced because it is now clear that the Ordinance permits a division. This case was entered as argument before the new amendment permitting the division was discovered. Voters passed this amendment and it doesn't give the ZBA the discretion to decide whether or not to permit the division – it is allowed if the Board finds that there were two uses on this lot prior to the approval of the Ordinance amendment in 2009.

Mr. Nims added that the lot size requirements are met as proposed because the lots are on sewer. The buildings also meet street and side setbacks in both proposals. He has now done the lot coverage calculations based on the estimated square footage of each lot in both proposals: The trailer has a 1775 SF footprint; 20% of the smaller of the two lot divisions for Parcel A is 2600 SF so both proposed divisions comply. The house & garage have a total footprint of 1425 SF and 20% of the smallest proposed division is 4600 SF. In both versions both lots would be conforming with regard to lot coverage. So, outside of the Shoreland requirements, both proposals conform to the other (space and bulk) standards of the Ordinance.

MOTION by Mr. Wheelwright seconded by Ms. Norton that as a Finding of Fact there were in fact two separate structures existing on the one lot as of the effective date of this Ordinance.

VOTE: 4-0-0

MOTION by Mr. Wheelwright seconded by Mr. Lookner that based on comments and testimony from the Code Enforcement Officer each structure may be sold; the laws above do not apply; the State minimum lot size and the subsurface disposal laws do not apply because the lots are on Town sewer; and the Application can be approved per Article VI Section 2.2(b).

VOTE: 4-0-0

The Board went on to deliberate “as non-conforming as possible”.

Mr. Lookner: Both divisions will limit the scope of any expansions of the dwellings so there is no difference there. But B is the more sensible with regard to river frontage unless it should be that each lot should have some frontage if they are in the Shoreland Zone.

MOTION by Mr. Lookner seconded by Mr. Wheelwright to Find that it is the position of the Board that the property division labeled Exhibit B is preferable by members of the Board in view of many factors discussed by the Board today including: 1) That it limits future expansion of the dwelling on Parcel A and 2) Only one lot will have direct water access to the river.

VOTE: 4-0-0

MOTION by Mr. Wheelwright seconded by Mr. Lookner that the Board should approve the application based on calculations from the surveyor and the Code Enforcement Officer that Parcel A meets current lot coverage restrictions.

VOTE: 4-0-0

MOTION by Mr. Wheelwright seconded by Mr. Toole that Exhibit B, relative to Article VI, Section 2. 2(b) meets those guidelines as being as conforming as possible to demonstrate the requirements of the ordinance.

VOTE: 4-0-0

MOTION by Mr. Wheelwright seconded by Ms. Norton to approve the Minutes of August 27, 2009 as submitted.

VOTE: 3-0-1 with Mr. Lookner abstaining due to his absence

There being no further business before the Board they adjourned at 6:15 pm.

Respectfully Submitted,

Jeanne Hollingsworth, Recording Secretary